Office - Supreme Court, U.S.
FILED
Jul 29 1983
ALEXANDER L. STEVAS,
CLERK

NO. 82-862

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

LEE ANN LESTRANGE DARRONE, as Administratrix of the Estate of THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

AMERICAN COUNCIL OF THE BLIND AND SIXTY-TWO OTHER NATIONAL, STATE AND LOCAL ORGANIZATIONS DEDICATED TO PROMOTING THE CIVIL RIGHTS OF DISABLED PERSONS IN SUPPORT OF RESPONDENT

BRIEF OF AMICI CURIAE

DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC.
ARLENE BRYNNE MAYERSON*
KIMBERLY SWAIN
ROBERT J. FUNK
2032 San Pablo Avenue
Berkeley, CA 94704
Telephone: (415) 644-2555
Counsel to Amici Curiae American Council of the Blind, et al.

**Counsel of Record*

BOWNE OF SAN FRANCISCO, INC. • 180 NINTH ST. • S.F., CA 94103 • (415) 864-6500

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Authorities	ii
Interest of Amici	1
Summary of Argument	6
Argument	7
I. Disabled Americans Face Widespread Discrimination in Employment Which Congress Sought to Remedy by Passing a Broad Antidiscrimination Statute, Section 504	7
A. When Viewed in Its Historical Context It Is Clear that Section 504 was Intended to Broadly Prohibit Discrimination Against Disabled Americans by Recipients of Federal Financial Assistance	7
B. The Nature and History of Prejudice Towards Disabled People	11
C. Documentation of the Reality of Disability-Based Employment Discrimination	15
Conclusion	30

TABLE OF AUTHORITIES

Cases

Page

Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979) 27

Carney v. Carney, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979) 13

Coleman v. Casey County Board of Education, 510 F. Supp. 301 (W.D. Ky. 1980) 25, 26

Community Television of S. Cal. v. Gottfried, 103 S. Ct. 885 (1983) 11

Conn. Institute for the Blind v. Comm. on Human Rights & Opportunities, 176 Conn. 88, 405 A.2d 618 (1978) 25

Dairy Equipment Co. v. Wis. DILHR, 95 Wis. 2d 319, 290 N.W. 2d 330 (1980) 26

Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir. 1971) 20

Ensley Branch of N.A.A.C.P. v. Seibels, 616 F.2d 812 (5th Cir. 1980) 27

Firefighters Institute v. City of St. Louis, 616 F.2d 350 (8th Cir. 1980) 27

Gurmankin v. Costanzo, 411 F. Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977) 25

Heumann v. Board of Education of the City of N.Y., 320 F. Supp. 623 (S.D. N.Y. 1970) 25

LeBlanc v. Southern Bell Telephone & Telegraph Co., 333 F. Supp. 602 (E.D. La. 1971), *aff'd*, 460 F.2d 1229 (5th Cir. 1972), *cert. denied*, 409 U.S. 990 (1972) 23

Mills v. Bd. of Education of the Dist. of Columbia, 348 F. Supp. 866 (D.D.C. 1972) 9

Muller v. Oregon, 208 U.S. 412 (1908) 14

Pa. Assoc. for Retarded Citizens v. Commonwealth of Pa., 334 F. Supp. 1257 (E.D. Pa. 1971) 9

Panettieri v. C. V. Hill Refrigeration, 159 N.J. Super. 472, 388 A.2d 630 (1978) 26, 27

Table of Authorities

Cases

Page

Pushkin v. Regents of the Univ. of Col., 658 F. 2d 1372 (10th Cir. 1981) 20

Rosenfeld v. Southern Pacific Co., 444 F.2d 1219 (9th Cir. 1971) 23

Smith v. Fletcher, 393 F. Supp. 1366 (S.D. Tex. 1975), *modified*, 559 F.2d 1014 (1977) 25

Sterling Transit Co. v. FEPC, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981) 26

Stutts v. Freeman, 694 F.2d 666 (11th Cir. 1983) 27

U.S. v. City of Chicago, 549 F.2d 415 (7th Cir. 1977) 27

U.S. v. State of N.Y., 475 F. Supp. 1103 (N.D. N.Y. 1979) 27

Weeks v. Southern Bell Telephone & Telegraph Co., 408 F.2d 228 (5th Cir. 1969) 23

Federal Statutory Provisions

Architectural Barriers Act of 1968, 42 U.S.C. Section 4151 *et seq.* 9

Education for All Handicapped Children Act of 1975, 20 U.S.C. Section 1401 *et seq.* 10

National Housing Act Amendments of 1975, 12 U.S.C. Section 1701 *et seq.* 10

The Rehabilitation Act of 1973, as amended, 29 U.S.C. Section 794 ..... *Passim*

Smith Fess Act of 1920, Pub. L. No. 66-236, 41 Stat. 735 8

Urban Mass Transportation Act of 1970, 49 U.S.C. Section 1612 9

TABLE OF AUTHORITIES

Congressional Materials

United States Senate

Page

Rehabilitation of the Handicapped Programs 1976: Oversite Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies Under The Rehabilitation Act of 1973 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare, 94th Cong., 2d Sess. 629-62 (1976) 17

S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076 ..... 8, 17

S. Rep. No. 1297, 93d Cong. 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373 10

House of Representatives

Aid to the Physically Handicapped: Hearings Pursuant to H. Res. 230 Before the Subcomm. to Investigate Aid to the Physically Handicapped of the House Comm. on Labor, 78th Cong., 2d Sess. 1057 (1944) 19, 20

H. R. Rep. No. 432, 89th Cong., 1st Sess. (1965) 8

Congressional Record

117 Cong. Rec. 42293 (1971) 13

117 Cong. Rec. 45974 (1971) (Rep. Vanick) 20

118 Cong. Rec. 2998, 3320-21 (1972) 16, 17

118 Cong. Rec. 3321-22 (1972) (Sen. Williams) 9

118 Cong. Rec. 11363 (1972) (Rep. Vanick) 20

119 Cong. Rec. 5882 (1973) (Sen. Cranston) 11

119 Cong. Rec. 24587 (1973) (Sen. Taft) 11

TABLE OF AUTHORITIES

Articles

Page

Barker, *The Social Psychology of Physical Disability*, 4:4 J. of Soc. Issues 28 (1948) 19

Barker, Wright, Meyerson & Gonich, *Adjustment to Physical Handicap and Illness: A Survey of the Social Psychology of Physique and Disability*, 55 Bull. of the Soc. Science Research Council (1953) 19

Burgdorf and Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 Santa Clara Law. 882 (1975) 12

Colbert, Kalish & Chang, *Two Psychological Portals of Entry for Disadvantaged Groups*, 34:7 Rehab. Literature 194 (1973) 18

Cowen, Underberg & Verillo, *The Development and Testing of Attitudes to Blindness Scale*, 48 J. of Soc. Psychology 297 (1958) 19

Felton & Litman, *Study of Employment of 222 Men with Spinal Cord Injuries*, 46 Archives of Physical Med. and Rehab. 809 (1965) 20, 21

Hahn, *Disability and Rehabilitation Policy: Is Paternalistic Neglect Really Benign?* (Book Review), 42 Pub. Ad. Rev. 385 (1982) 15

Himes, *Measuring Social Distance in Relations with the Blind*, 54 Outlook for the Blind 54 (1960) 21

Kettle and Massie, *Need a Disability Be a Handicap?* 13:2 Personnel Mgmt. 32 (1981) 19, 29

Lukoff and Whiteman, *Attitudes Toward Blindness*, 55 The New Outlook for the Blind 39 (1961) 12

Nagi, *Work, Employment & the Disabled*, 31 Am.J. Econ.Soc. 21 (1972) 23

Pati and Gopal, *Countdown on Hiring the Handicapped* 57:3 Personnel J. 144 (1978) 29

TABLE OF AUTHORITIES

ARTICLES

Page

Rockey, Fantel, and Omenn, *Discriminatory Aspects of Pre-employment Screening: Low-back X-ray Examination in the Railroad Industry*, 5 Am. J.L. & Med. 197 (1979) 22

tenBroek & Matson, *The Disabled & the Law of Welfare*, 54 Calif. L. Rev. 809 (1966) 8

Triandis and Patterson, *Indices of Employer Prejudice Toward Disabled Applicants*, 47 J. of Applied Psychology 52 (1963) 18, 19

Viscardi, *The Adaptability of Disabled Workers*, 2:3 Rehab. Rec. 3 (1981) 23

Williams, *Is Hiring the Handicapped Good Business*, 38:2 J. of Rehab. 30 (1972) 21

TABLE OF AUTHORITIES

Books

Page

F. Bowe, *Rehabilitating America: Barriers to Disabled People* (1978) 15

Burgdorf and Burgdorf, *The Legal Rights of Handicapped Persons: Cases, Materials, and Text* (1980) 25

E. I. duPont de Nemours & Co., *Equal to the Task* (1981) 29, 30

2 Eisenberg, Griggins & Duvall, *Disabled People as Second-Class Citizens* (1982) 12, 15

Ellner and Bender, *Hiring the Handicapped* (1980) 29

Gliedman and Roth, *The Unexpected Minority: Handicapped Children in America* (1980) 14, 15

Greenleigh Associates, Inc., *A Study To Develop a Model for Employment Services for the Handicapped* (1969) 23

A Kraditor, *Up From the Pedestal: Selected Writings in the History of American Feminism* (1968) 14

National Institutes on Rehabilitation and Health Services, *Report of the National Workshop on Rehabilitation and Workmen's Compensation* (1971) 29

Safilios-Rothschild, *The Sociology and Social Psychology of Disability and Rehabilitation* (1970) 19

Urban Institute, *Report of the Comprehensive Service Needs Study* (1975) 17, 18, 20, 21, 23, 27, 28

1 Vash, *The Psychology of Disability* (1981) 13

Wright, *Physical Disability—A Psychological Approach* (1960) 19

TABLE OF AUTHORITIES

Miscellaneous

Page

Bureau of the Census, U.S. Dept. of Commerce, *Current Population Surveys* (1981, 1982) 16

Bureau of Labor Statistics, U.S. Dept. of Labor, Bull. No. 923, *The Performance of Physically Impaired Workers in Manufacturing Industries* (1948) 27, 28

Kalenik, *Myths About Hiring the Physically Handicapped,* The Ca. Governor's Committee for Employment of the Handicapped, *reprinted from Job Safety and Health* (1974) 29

Letter of Finding, Dept. of Health & Human Services, Office of Civil Rights, Region IX (Nov. 7, 1980) 22

Medical Standards Project: Final Report, Employment Law Center & Disability Rights Education and Defense Fund, Inc. (1982) 22

Pres. Comm. on Employment of the Handicapped, *A Blueprint for Action* (1980) 29

Pres. Comm. on Employment of the Handicapped, *The Law & Disabled People* (1980) 24

U.S. Bureau of Labor Standards, Dept. of Labor, Bull. No. 234, *Workmen's Compensation and the Physically Handicapped Worker* (1961) 29

U.S. Dept. of Labor, Bull. No. 122, *Proceedings of the National Conference on Workmen's Compensation & Rehabilitation* (1950) 29

NO. 82-862

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1982

CONSOLIDATED RAIL CORPORATION,
Petitioner,

VS.

LEE ANN LESTRANGE DARRONE, as Administratrix of the Estate of THOMAS LESTRANGE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF AMICI CURIAE

AMERICAN COUNCIL OF THE BLIND AND SIXTY-TWO OTHER NATIONAL, STATE AND LOCAL ORGANIZATIONS DEDICATED TO PROMOTING THE CIVIL RIGHTS OF DISABLED PERSONS IN SUPPORT OF RESPONDENT

INTEREST OF AMICI

Amici American Council of the Blind *et al.* include 63 national, state and local membership, service and advocacy organizations that represent and serve over fifteen million disabled individuals and their families. Each Amici is actively involved in working to eliminate historical stereotypes, prejudices and the resulting discriminatory practices and policies that serve to exclude disabled people from participating as valued and contributing members of our society.

Amici know through experience that discrimination in employment is a major social impediment that adversely and severely affects the opportunity of disabled individuals to achieve integration into the social and economic mainstream. Amici recognize that the interpretation and implementation of Section 504 will, in significant part, determine the opportunities disabled people will have to be integrated into society and, therefore, submit the following brief in support of respondent. (Copies of letters from the parties consenting to the Amici filing this brief have been filed with clerk of the Court.)

National Membership, Service and Advocacy Organizations

Amicus American Council of the Blind (ACB) is the nation's largest non-profit membership organization of blind and visually impaired individuals. ACB seeks to ensure that blind people have the opportunity to participate fully in all aspects of American life and to that end works to promote strong state and federal anti-discrimination laws.

Amicus American Coalition of Citizens with Disabilities is an umbrella organization of national, state and local disability organizations representing over seven million disabled individuals.

Amicus Association for Retarded Citizens (ARC) is a national organization of over 180,000 members devoted to improving the welfare of mentally retarded citizens and their families. ARC is extensively involved in job training and placement programs for handicapped persons.

Amicus Disability Rights Center is a non-profit public interest organization created in 1976 by disabled people to strengthen the rights of disabled people through programs in education and advocacy on the federal level, with particular focus on enforcement of legislation prohibiting discrimination in employment.

Amicus Epilepsy Foundation of America is a national non-profit corporation founded in 1968 to advance the opportunities of the two million persons with epilepsy. The Foundation has a long-standing commitment to eliminating the stereotypes and prejudices which serve to exclude persons with epilepsy from employment.

Amicus National Alliance for the Mentally Ill, a national organization with 225 state and local affiliates, is a mutual support, self-help and advocacy organization that provides programs in education, community service, vocational education and support to over 130,000 mentally ill persons and their families each year.

Amicus National Association of Protection and Advocacy Systems represents the state agencies designated by the Governor of each state to protect and advocate for the rights of persons with developmental disabilities. The 54 state protection and advocacy agencies represented by the Association serve over 40,000 disabled clients per year, including representation of large numbers of disabled persons who have experienced discrimination in employment.

Amicus National Congress of Organizations of the Physically Handicapped is a national coalition of physically disabled persons and their organizations. Founded in 1958, its purpose is to secure the rights and opportunities of its members to full participation in society.

Amicus National Easter Seal Society is the nation's oldest and largest nonprofit, community-based health agency providing direct services to persons with disabilities. In 1982, through a nationwide network of 826 local affiliates, Easter Seals provided vocational and rehabilitation services to over 750,000 individuals.

Amicus National Mental Health Association is a national organization of over one million members, providing services and education through 42 state and 650 local affiliates.

Amicus National Society for Children and Adults with Autism is a national health agency dedicated to the education and welfare of children and adults with severe communication and behavior disorders.

Amicus Parents Campaign for Handicapped Children and Youth is a national organization that provides information and support to a nationwide network of over 100,000 parents of disabled children.

Amicus The Association for the Severely Handicapped has a national membership of parents, researchers, teachers, administrators and others dedicated to making education and support services available to persons with severe disabilities in order to ensure their integration into society.

Amicus United Cerebral Palsy Associations (UCPA) is a national non-profit voluntary health organization formed in 1949. UCPA assists its 225 affiliates throughout the country in the provision of rehabilitation and related direct services, education and advocacy programs, and other activities designed to promote the welfare of disabled persons.

Amicus World Institute on Disability is a nonprofit organization created by disabled persons to undertake policy analysis, research and education programs in order to eliminate discrimination and prejudicial attitudes that deny equality of opportunity and the full participation of disabled people in society.

Amicus American Civil Liberties Union (ACLU) is a nationwide non-partisan organization of over 250,000 members. The ACLU and its affiliates have a deep and continuing interest in protecting the Constitutional and statutory rights of persons with disabilities, including rights secured by Section 504.

Amicus American Federation of State, County and Municipal Employees-AFL/CIO (AFSCME) represents more than 1.4 million public employees throughout the United States, among which are over 300,000 health care workers. AFSCME has established a committee on disabled workers to promote the interests of their disabled membership.

Statewide Membership, Service and Advocacy Organizations

Amici, Advocates for Disabled Ohioans, California Association of the Physically Handicapped, Coalition of Texans with Disabilities, Handicapped United of West Virginia, Louisiana Coalition of Citizens with Disabilities, Maine Association of Handicapped Persons, People First of California and Washington PAVE are all organizations of and for disabled persons or parents of disabled children. These organizations have chapters, affiliates and membership throughout their respective states and undertake research, education and advocacy to secure the civil rights of disabled adults and children under state and federal law.

Amici CO-AD, Inc. (Idaho), Developmental Disabilities Law Center (Massachusetts), Georgia Advocacy Office, Protection and Advocacy, Inc. (California) and West Virginia Advocates for the Developmentally Disabled are all nonprofit corporations designated by the respective state Governor to protect and advocate for the rights of persons with developmental disabilities.

Amicus California State Council on Developmental Disabilities is a federally funded state agency established under federal and state law to advocate for the rights and protections guaranteed all persons with developmental disabilities.

Amicus Florida Office of Vocational Rehabilitation is a state vocational rehabilitation agency that provides services and support to physically and mentally disabled persons in order to assist them in achieving gainful employment.

Local Membership, Service and Advocacy Organizations

Amici, Adult Independence Development Center, Santa Clara, California; Boston Center for Independent Living, Boston, Massachusetts; Center for Independence of the Disabled in New York; Center for Independent Living, Berkeley, California; Center for Survival and Independent Living, Miami, Florida; Community Resources for Independent Living, Hayward, California; Dayle McIntosh Center for the Disabled, Garden Grove, California; Developmental Services of Northwest Kansas-Operation Link, Hayes, Kansas; Dutchess Center for Accessible Living, Poughkeepsie, New York; Erie Independence House, Erie, Pennsylvania; Hawaii Centers for Independent Living, Honolulu, Hawaii; Holistic Approaches to Independent Living, Denver, Colorado; Humboldt Access Project, Eureka, California; Independence Associates, Elmwood, Massachusetts; League of Human Dignity, Lincoln, Nebraska; Metro Independent Living Center, Tucson, Arizona; Rochester Center for Independent Living, Rochester, New York; Self Reliance Inc. Center for Independent Living, Tampa, Florida; Stepping Stones, Inc., Moscow, Idaho; Tri-County Independent Living Program, Portland, Oregon; and Vermont Center for Independent Living, Montpelier, Vermont, are local independent living programs operated by and for disabled persons. Each organization provides a range of independent living support services to assist severely disabled persons to live independently outside of institutions, as participating members of society.

Amici, Chicagoland Disabled Coalition, Chicago, Illinois; Council for Disability Rights, Chicago, Illinois; Disabled in Action of Greater Syracuse, Syracuse, New York; Disabled in Action of Metropolitan New York, New York; Federation of Handicapped Individuals, Des Moines, Iowa; Handicapped Information Office—Larimer County Association of the Blind and Physically Handicapped, Fort Collins, Colorado; Information and Referral Services for Persons with Disabilities, Chicago, Illinois; Maryland Alliance of Advocates with the Handicapped, Riverdale, Maryland; Parents

and Advocates for Special Education, Richmond, California; and Society's Assets Disability Coalition, Racine, Wisconsin, are all organizations of and for disabled persons or parents of disabled persons. These organizations undertake education and advocacy activities to promote the civil rights of disabled adults and children within their respective geographic areas.

SUMMARY OF THE ARGUMENT

This brief is submitted in support of the position that Section 504 of the 1973 Rehabilitation Act, as amended, 29 U.S.C. Section 794 (hereinafter cited as Section 504), was intended to broadly prohibit employment discrimination against disabled Americans by recipients of federal financial assistance. Amici will not reiterate the legislative history of Section 504 which is fully reviewed in respondent's brief. Instead, Amici will set forth an historical framework for consideration of the scope of Section 504, and will examine the governmental, sociological and psychological studies and case law which document the existence of widespread employment discrimination against disabled Americans.

In enacting Section 504 of the 1973 Rehabilitation Act, Congress realized that the same prejudices and stereotypes which prevent a potential employer from fairly evaluating the qualifications of disabled applicants and workers, operate to unjustly exclude disabled people from many other opportunities as well. Section 504 constitutes the establishment of a broad governmental policy that programs receiving federal financial assistance be operated without discrimination on the basis of handicap. To narrowly interpret the coverage of employment in Section 504, or to imply a drastic retreat in employment coverage in the 1978 amendments, belies the historical context of Section 504, undermines the very purpose of the Rehabilitation Act to promote employment opportunities, and frustrates the clear intent of Congress to insure equal opportunity to disabled Americans.

ARGUMENT

I. Disabled Americans Face Widespread Discrimination in Employment Which Congress Sought to Remedy by Passing a Broad Anti-Discrimination Statute, Section 504.

The general public does not associate the word "discrimination" with the segregation and exclusion of disabled people. Most people assume that disabled children are excluded from school or segregated from their non-disabled peers because they cannot learn or because they need special protection. Likewise, the absence of disabled co-workers is simply considered confirmation of the obvious fact that disabled people can't work. These assumptions are deeply rooted in history.

Most people are never forced to examine their assumptions or stereotypes about disabled people unless they themselves or a family member becomes disabled, or they have a disabled child. At that point the falseness of the stereotypes and the injustice of the policies based on those stereotypes become all too apparent.

What is historic about Section 504 is that it makes the examination of these stereotypes a matter of public policy. And when the stereotypes result in unfair exclusion or segregation, Section 504 recognizes it for what it is—discrimination. An understanding of the nature of prejudice and the role of stereotypes in foreclosing employment opportunities to qualified disabled Americans is necessary to fully appreciate the historic significance of Section 504.

A. When Viewed in Its Historical Context It Is Clear that Section 504 was Intended to Broadly Prohibit Discrimination Against Disabled Americans by Recipients of Federal Financial Assistance

Historically, the inferior economic and social status of disabled people was viewed as an inevitable consequence of the physical and mental limitations imposed by disability. Over the years, this assumption has been challenged by policy makers, professionals, disabled citizens, the courts

and by Congress. Gradually, disability public policy has recognized that many of the problems faced by disabled people are not inevitable, but instead are the result of discriminatory polices based on unfounded, outmoded stereotypes and perceptions and deeply embedded prejudices toward disabled people. These discriminatory policies and practices affect disabled people in every aspect of their lives.

The first major challenge to the notion that being disabled meant life-long economic dependency was prompted by the return of a vast number of disabled World War I veterans and the ever increasing incidence of industrial accidents. Recognizing the social and financial benefit of returning these injured persons to work, Congress passed the original landmark federal rehabilitation legislation, the Smith Fess Act of 1920.[1] The prevalent view of disabled people as "helpless" and "hopeless" was challenged by legislation designed to enable disabled people to become productive, contributing members of society. The passage of rehabilitation legislation embodied a clear awareness by Congress that disabled Americans shared with others the desire for "self-support—for the dignity of independence, the pride of self-reliance, and the sense of personal achievement. . . ." tenBroek & Matson, *The Disabled & the Law of Welfare,* 54 Calif. L. Rev. 809, 835 (1966). Most importantly, by the mid 1960's the explicit goal of rehabilitation policy was the integration of disabled people into the mainstream of American life.[2] This "integrationist" goal set the stage for an examination of the social barriers which impede the attainment of equal opportunity for disabled Americans.

---

[1]Pub. L. No. 66-236, 41 Stat. 735. In the fifty-three years prior to the 1973 Rehabilitation Act, the program was substantially expanded in scope in 1943, 1954, 1965 and 1968. For a history of the vocational rehabilitation program, *see* S. Rep. No. 318, 93d Cong. 8-13, 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076, 2082-86.

[2]*See* H. R. Rep. No. 432, 89th Cong., 1st Sess. 2 (1965).

From a civil rights perspective, a profound and historic shift in disability policy occurred in the 1970's.[3] Following the powerful civil rights activism of the 1960's, the 1970's produced a more fundamental change in the social and legal status of disabled people than any prior era of American history. Through landmark litigation[4] and legislation,[5] disabled Americans were recognized for the first time as a legitimate minority subject to discrimination and worthy of basic civil rights protections.

This major shift in disability public policy culminated in the passage of a broad anti-discrimination provision,

---

[3]This shift in public policy is well portrayed in a statement made by Senator Williams prior to the enactment of the 1973 Rehabilitation Act.

> For too long, we have been dealing with [the handicapped] out of charity . . . . This is medieval treatment for a very current problem. . . . Most of us see the handicapped only in terms of stereotypes that are relevant for extreme cases. This ancient attitude is in part the result of the historical separation of our handicapped population. *I wish it to be said of America in the 1970's that when its attention at last returned to domestic needs, it made a strong and new commitment to equal opportunity and equal justice under law; . . . The handicapped are one part of our Nation that have been denied these fundamental rights for too long. It is time for the Congress and the Nation to assure that these rights are no longer denied.* (emphasis added). 118 Cong. Rec. 3321-22 (1972).

[4]Two landmark cases *Pa. Assoc. for Retarded Citizens* v. *Commonwealth of Pa.*, 334 F.Supp. 1257 (E.D. Pa. 1971; and *Mills* v. *Bd. of Education of the Dist. of Columbia*, 348 F.Supp. 866 (D.D.C. 1972), held that disabled children who had previously been excluded from public education had the right to a public education appropriate to their educational needs.

[5]In addition to the 1973 Rehabilitation Act, Congress enacted several other pieces of legislation designed to promote equal opportunity and integration of disabled people into the mainstream of American life. Chronologically, these statutes included: 1968—Architectural Barriers Act, 42 U.S.C. Section 4151 *et seq.* (required federally funded or leased buildings to be accessible); 1970—Urban Mass Transportation Act, 49 U.S.C. Section 1612 (required eligible jurisdictions to provide accessibility plans for mass transportation);

Section 504 of the Rehabilitation Act of 1973. Section 504 evidences Congress' recognition that while there are major physical and mental variations in different disabilities, disabled people as a group faced similar discrimination in employment, education and access to society.[6] As with racial minorities and women, Congress recognized that legislation was necessary to ameliorate wide-spread institutionalized discrimination.[7]

The historical significance of Section 504 cannot be overstated. Section 504 presents a fundamental challenge to traditional notions of disability. Section 504's anti-discrimination language acknowledges that many of the problems faced by disabled people are not an inevitable consequence of physical or mental traits themselves, but rather of the often false perceptions and prejudices others hold about those traits. Congress recognized that only a broad ban on

---

1975—Education for All Handicapped Children Act, 20 U.S.C. Section 140 *et seq.* (provided that each handicapped child was entitled to a free appropriate education in the least restrictive environment); and 1975—National Housing Act Amendments 12 U.S.C. Section 1701 *et seq.* (provided for barrier removal in federally supported housing).

[6]As stated in the Senate Report accompanying the 1974 amendments to the 1973 Act:

> "Section 504 was enacted to prevent discrimination against all handicapped individuals, . . . in relation to federal assistance in employment, housing, transportation, education, health services, or any other Federally-aided program." S. Rep. No. 1297, 93d Cong. 2d Sess. 38, *reprinted in* 1974 U.S. Code Cong. & Ad. News 6373, 6388.

[7]That Section 504 was intended to include disability within the general corpus of federal anti-discrimination law is unmistakable. As stated in the Senate Report accompanying the 1974 amendments:

> Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, . . . and section 901 of the Education Amendments of 1972 . . . . The section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. *Id.* at 39, *reprinted in* 1974 U.S. Code Cong. & Ad. News at 6390.

discrimination would realize the ultimate goal of rehabilitation legislation—the integration of disabled people into all aspects of American life.[8]

As this Court recently stated, Section 504 "confirms the federal interest in developing the opportunities for all individuals with handicaps to live full and independent lives." *Community Television of S. Cal. v. Gottfried*, 103 S.Ct. 885, 892 (1983). Nothing is more central to the Congressional goal of independence than employment. As demonstrated below, disabled Americans face widespread discrimination in seeking to secure equal employment opportunities. Hence, a restrictive interpretation of employment coverage is contrary to the very purpose of the 1973 Rehabilitation Act, and the history and language of Section 504.[9]

B. The Nature and History of Prejudice Towards Disabled People.

• • •

"But all along the disabled themselves have known that there was more to disability than a malfunctioning

---

[8]Congress' understanding of the effects of employment discrimination on the goal of the Rehabilitation Act is evident from the legislative history of the 1973 Act. *See, e.g.*,

> However, if we are to assure that all handicapped persons may participate fully in the rewards made possible by the vocational rehabilitation program, we must devote more of our energy toward the elimination of the most disgraceful barrier of all—discrimination. 119 Cong. Rec. 24587 (1973) (Sen. Taft).
>
> [D]iscrimination in placement, hiring and advancement continues to limit the vocational rehabilitation program's ability to effect successful rehabilitation .... *Id.* at 5882 (Sen. Cranston.)

[9]In the intervening years between passage of Section 504 and the 1978 Amendments, Congress became increasingly aware of the problems faced by disabled Americans in seeking to secure equal employment opportunity. After hearings and review, in 1978 Congress explicitly affirmed the Section 504 regulations promulgated by the Department of Health, Education and Welfare, which included provisions prohibiting employment discrimination regardless of the purpose of the federal financial assistance. There can be no doubt that the 1978 Amendments were intended to affirm and expand civil rights protections to disabled Americans. See respondent's brief at Part III (4) and brief of amicus curiae United States at pp. 22-26.

> bodily system. They have known that this was not the only, or even the most important, of their problems . . . for being disabled, they know, means living in the world as someone "different," "abnormal," "inferior." . . . It means people shying away from you, pitying you, or rejecting you completely. It means trouble finding a job or a decent place to live. It often means living at the poverty level and going on welfare. It means *discrimination*. Being disabled is not just having a bodily defect —it is a complex social-political reality that one lives with day by day, year by year." 2 Eisenberg, Griggins & Duval, *Disabled People as Second-Class Citizens* at xii-xiv (1982).

* * *

The roots of prejudice against and stereotypes about disabled people reach far back in history and persist today. Disabled people have throughout history been regarded as incomplete human beings—"defective." In early societies this view of disabled people resulted in persecution, neglect and death.[10] These practices gradually gave way to the more humanitarian belief that disabled people should be given care and protection. Persecution was largely replaced by pity, but the exclusion and segregation of disabled people remained unchallenged.[11] Over the years, the view of disabled people as incompetent and dependent upon charity, custodial care and protection became firmly embedded in the public consciousness. The invisibility of disabled Americans was simply taken for granted. Disabled people were out of sight and out of mind.

---

[10]For an historical overview of persecution of disabled people in early societies, *See* Burgdorf and Burgdorf, *A History of Unequal Treatment: The Qualifications of Handicapped Persons as a 'Suspect Class' Under the Equal Protection Clause*, 15 Santa Clara Law. 882-86 (1975).

[11]Interestingly, a positive relationship has been established between tendencies to pity blind people on the one hand, and the tendency to espouse community segregation for the blind on the other. Lukoff & Whiteman, *Attitudes Towards Blindness*, 55 The New Outlook for the Blind 39, 42 (1961)

The discriminatory nature of policies and practices which exclude and segregate disabled people has been obscured by the unchallenged equation of disability with incapacity and by the gloss of "good intentions." The innate biological and physical "inferiority" of disabled people is considered self-evident. This "self-evident" proposition has served to justify the exclusion and segregation of disabled people from all aspects of life. The social consequences which have attached to being disabled often bear no relationship to the physical or mental limitations imposed by the disability. For example, being paralyzed has meant far more than being unable to walk—it has meant being excluded from public school,[12] being denied employment opportunities,[13] and being deemed an "unfit" parent.[14] These injustices co-exist with an atmosphere of charity and concern for disabled people.

In an earlier day, prevailing beliefs about blacks and women have supplied socially and politically potent justifications for the subordination of these groups. The "innate" differences of blacks from whites and men from women

---

[12]"Many of the physically handicapped children do have the mental ability to attend public school but are denied that right due to architectural barriers and-or transportation problems." 117 Cong. Rec. 42293 (1971).

[13]*See infra* pp. 24-25.

[14]"Historically, child-custody suits almost always have ended with custody being awarded to the non-disabled parent, regardless of whether affectional or socio-economic advantages could have been offered by the disabled parent." 1 Vash, *The Psychology of Disability* 155 (1981).

This issue was eloquently addressed in a landmark decision by the California Supreme Court, *Carney v. Carney*, 24 Cal. 3d 725, 598 P.2d 36, 157 Cal. Rptr. 383 (1979). In that case the lower court awarded custody to the mother of two boys after the father was injured and became a quadriplegic. The California Supreme Court reversed, stating that ". . . the court's preconception . . . , also stereotypes William as a person deemed forever unable to be a good parent simply because he is physically handicapped. Like most stereotypes, this is both false and demeaning." *Id.* at 737, 598 P.2d at 42, 157 Cal. Rptr. at 389.

were viewed as mandating social and economic stratification. Fortunately, the following editorial in the New York Herald in 1852 can now be viewed as an historic relic:

> How did women first become subject to men as she now is all over the world? By her nature, her sex, just as the negro, is and always will be, to the end of time, inferior to the white race, and therefore, doomed to subjection; but happier than she would be in any other condition, just because it is the law of her nature. A. Kraditor, *Up From the Pedestal: Selected Writings in the History of American Feminism* 190 (1968).[15]

Unfortunately, the historic stereotypes and perceptions of disabled people have remained largely unquestioned. As explained in a seminal work by Gliedman and Roth, *The Unexpected Minority: Handicapped Children in America* 32 (1980):

> Racial tolerance begins with an assertion of the equality of all racial and ethnic groups. This assertion takes the form of a direct challenge to the racist's perceptions and the racist's theories of race difference: blacks are not "self-evidently" inferior. In contrast, the lay culture's notion of tolerance towards handicapped people takes for granted the reality of the "self-evident" inferiority of the handicapped person. Instead of challenging this vulgar prejudice, it makes its analytical point of departure the negative feelings that our naive perceptions of handicapped people often provoke in us. Yes, we say, handicapped people are indeed as helpless and incompetent as we believe them to be. But our response is unfair.
>
> * * *
>
> [O]ur ordinary ideal of tolerance and fairness to the disabled reinforces society's most damaging, demean-

---

[15] Similarly, in 1908 in *Muller v. Oregon*, 208 U.S. 412, 421 (1908), Justice Brewer stated, "That women's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious."

> ing, and unfair confusions about the nature of disability. A certain kind of paralysis may well be a permanent condition. But the social obstacles to adulthood encountered by the crippled child and adult are arbitrary, unfair, and of considerably greater importance than the biological limits to normal function that are imposed by the paralysis. *Id.* at 35.

It is only within the last decade that a fundamental challenge to traditional notions about disability has been launched. Increasingly, the social science and psychological literature has explored the implications of a socio-political definition of disability which recognizes the critical impact of social factors on the lives of disabled Americans.[16] There is a growing awareness of the similarities between racial prejudice and the prejudice experienced by disabled people.[17] And like women, disabled people have identified "paternalism" as a major obstacle to economic and social advancement.

Most importantly, Section 504 represents a direct attack on the stereotypes and prejudices which have served to exclude and segregate disabled people for centuries. Section 504 reflects a broad governmental commitment to the equal citizenship of disabled Americans. "[O]ne can only discriminate against those who *deserve* to be treated as social equals." *Id.* at 267.

C. Documentation of the Reality of Disability-Based Employment Discrimination.

Employers, like other members of the general public, hold stereotypes and prejudices about disabled people which impede their ability to objectively evaluate the qualifications of disabled applicants and workers. Disabled people face

---

[16]For a look at works which have utilized the socio-political definition of disability *see* Hahn, *Disability and Rehabilitation Policy: Is Paternalistic Neglect Really Benign?* (Book Review), 42 Pub. Ad. Rev. 385 (1982); Bowe, *Rehabilitating America: Barriers to Disabled People* (1978); Gliedman & Roth, *supra* p. 14; and Eisenberg, *supra* p. 12.

[17]*See infra* note 21.

discrimination in employment in a variety of ways. Many disabled people are excluded from the outset by medical requirements which screen out all people with specific disabilities or by inflated physical or other job requirements which bear no relationship to the successful performance of the job. Disabled people who are not completely excluded at the outset are often channeled into disability-stereotyped dead-ended jobs or denied promotional opportunities. These discriminatory policies affect all disabled people, whether their disabilities are severe, moderate or perceived.

Disabled people face staggering unemployment rates. In 1972, the following statistics were revealed to Congress:

> [T]here are more than 22 million adults in the United States with physical handicaps severe enough to limit in some way their ability to work. There are more than 5.6 million persons of all ages who are mentally retarded, some proportion of which are adults. Of the 22 million with physical disabilities, an estimated 14 million could work if given the opportunity. And of the 5.6 million who are mentally retarded, 9 out of 10 could work if given proper training and rehabilitation.
>
> Actual employment figures are not so positive. . . .
>
> There are about 150,000 blind persons of working age in this country. About 50,000 of them are employed.
>
> Of the 60,000 paraplegics of working age, 47 percent are employed.
>
> Of the 400,000 epileptics of working age, the employment rate, according to best estimates, is between 15 percent and 25 percent.
>
> And of the 200,000 persons of working age with cerebral palsy, only a handful are employed.
>
> 118 Cong. Rec. 3320-21 (1972).[18]

---

[18]According to 1981 and 1982 Current Population Survey studies conducted by the Bureau of the Census, the unemployment rate among disabled people who are job-ready and are currently seeking employment is nearly twice the national average. Bureau of the Census, U.S. Dept. of Commerce, *Current Population Surveys* (1981, 1982).

Particular note was taken of the high rate of unemployment among disabled Viet Nam veterans. At the end of 1971 the unemployment rate for Viet Nam veterans was 8.8%, as compared to 87.7% for disabled Viet Nam veterans. *Id.* at 2998.

The presumption that these figures reflect the actual inability of disabled people to work, is refuted by the many sociological, psychological and government studies which have documented that employment opportunities for disabled adults are severely impeded by misconceptions and generalizations about disabilities, unfounded fears about increased costs and decreased productivity, and outright prejudice toward disabled people. Of particular interest here are the findings of employment discrimination contained in a report which was authorized by Section 130 of the Rehabilitation Act of 1973, P.L. 93-112, and reported back to Congress prior to the 1978 Amendments. Urban Institute, *Report of the Comprehensive Service Needs Study* (1975) (hereinafter cited as *Needs Study*).[19] The *Needs Study* summarized existing literature on employer attitudes as follows:

> Virtually all the studies on employer attitudes have found that large proportions of employers disfavor hir-

---

[19]In hearings preceding the 1973 Act, Congress heard extensive testimony on the failure of vocational rehabilitation programs to serve severely handicapped individuals. *See* S. Rep. No. 318, 93d Cong., 1st Sess., *reprinted in* 1973 U.S. Code Cong. & Ad. News 2076. In 1973, Congress ordered HEW to conduct an intensive study on the needs of this population.

The findings of the *Needs Study* were reported back to Congress in 1976. *See* testimony of *Needs Study* chief author, Jerry Turen, *Rehabilitation of the Handicapped Programs 1976: Oversite Hearings on Rehabilitation of the Handicapped Programs and the Implementation of Same by Agencies Under the Rehabilitation Act of 1973 Before the Subcomm. on the Handicapped of the Senate Comm. on Labor and Public Welfare*, 94th Cong., 2d Sess. 629-62 (1976).

Hence, prior to the 1978 amendments, Congress was affirmed in its belief that employment discrimination poses a major barrier to the equal opportunity goal of the 1973 Act.

> ing disabled people. There are strong indications that these attitudes are in large part based on non-rational, negative feelings—prejudice, in other words. *Id.* at 324.

In keeping with the historical evolution of disability public policy, the *Needs Study* recommended:

> [A] major shift in research and development emphasis toward a focus on the interaction of the individual and the barriers in the environment . . . . The major problems seem to be not so much with the severely handicapped, as with the severely handicapping environment. *Id.* at 818.

Hence, stereotypes and prejudices rather than handicaps themselves were viewed as the most potent barrier to equal employment opportunity.

While few people would openly admit to feelings of hostility towards disabled people, the persistence of deeply rooted prejudices has been well documented. In one study reported in the *Needs Study*, the author probed the attitudes of employers by asking them to rank various groups in terms of which ones they believed most employers would be more likely to hire. Colbert, Kalish & Chang, *Two Psychological Portals of Entry for Disadvantaged Groups*, 34:7 Rehab. Literature 194 (1973), *cited in Needs Study* at 314-15. The list included physically and mentally disabled groups, minority groups, controversial groups (student militants, prison parolees), old people and "neutral" groups (e.g. whites, Canadians). The study found that *"physical disability groups were clustered together and ranked lower than all minority groups and old people and higher than all . . . mentally disabled groups."* *Id.* at 315. Employers were more willing to hire student radicals or prison parolees than people who were either physically or mentally disabled. *Id.* This finding is consistent with a frequently cited study which found that all disabled groups were subject to prejudice and that personnel directors would prefer to hire a former prison inmate or mental hospital patient than an epileptic. Triandis & Patterson, *Indices of Employer Prej-*

udice Toward Disabled Applicants, 47 J. of Applied Psychology 52 (963).[20]

Numerous studies have been conducted which conclude that disabled people are subject to the same type of prejudices and discrimination as members of racial and ethnic minorities. The earliest work in this area, Barker, *The Social Psychology of Physical Disability,* 4:4 J. of Soc. Issues 28 (1948), concluded that "the physically handicapped person is in a position not unlike that of the Negro, the Jew and other underprivileged racial and religious minorities; he is a member of an under-privileged minority." *Id.* at 31.[21] In a later study, Barker specifically reported that persons with various disabilities were unable to find adequate employment as a result of "irrational prejudice." Barker, Wright, Meyerson & Gonich, *Adjustment to Physical Handicap and Illness: A Survey of the Social Psychology of Physique and Disability,* 55 Bull. of the Soc. Science Research Council (1953).

The historic roots of prejudice against disabled people are amply illustrated in a statement by K. Vernon Banta, principal employment specialist of the War Manpower Commission in 1944. *Aid to the Physically Handicapped: Hearings Pursuant to H. Res. 230 Before the Subcomm. to Investigate Aid to the Physically Handicapped of the House Comm. on Labor,* 78th Cong., 2d Sess. 1057 (1944). Mr. Banta testified before Congress regarding the widespread belief by employers and the general public that disabled persons are undesirable employees, commenting that this attitude "undoubtedly dates from the days when

---

[20]Discrimination against epileptics persists despite the fact that 80 percent of people with epilepsy have their seizures fully controlled by medication. Kettle & Massie, *Need a Disability Be A Handicap?* 13:2 Personnel Mgmt. 32 (1981).

[21]*See also* Cowen, Underberg & Verillo, *The Development and Testing of an Attitudes to Blindness Scale,* 48 J. of Soc. Psychology 297 (1958); Wright, *Physical Disability—A Psychological Approach* (1960); Safilios-Rothschild, *The Sociology and Social Psychology of Disability and Rehabilitation* 111 (1970).

the disabled were destroyed instead of rehabilitated . . . ." *Id.* at 1059.

Often reflective of the employer's own prejudices are the fears about the "reaction of others" to a disabled worker. In a survey reported in *Needs Study,* employers were found to believe that paraplegics were best suited for jobs requiring a minimum of public contact. Employers feared the negative "reactions of others to the disability." Felton & Litman, *Study of Employment of 222 Men with Spinal Cord Injury,* 46 Archives of Physical Med. and Rehab. 809 (1965) *cited in Needs Study* at 321 n.32.[22]

This rationale for not hiring disabled workers persists today. In a recent case a doctor with multiple sclerosis was denied admission to a psychiatric residency program because the admissions committee feared the negative reactions of patients to his disability.[23] *Pushkin v. Regents of the Univ. of Col.,* 658 F.2d 1372 (10th Cir. 1981). The 10th Circuit found these fears to be based on general stereotypes rather than any actual information about the disabled applicant. After evaluating the evidence, the 10th Circuit

---

[22]This response is reminiscent of "customer preference" cases brought under Title VII. *See e.g. Diaz v. Pan American World Airways Inc.,* 442 F.2d 385 (5th Cir. 1971).

[23]Fears of the "reactions of others" have served to justify the exclusion of disabled people from many aspects of life. In 1971 one million handicapped children were excluded entirely from public school. 117 Cong. Rec. 45974 (1971). As stated by Congressman Vanick:

> [I]n the past, the reason for excluding these children from their right to an education has never been very clear. . . . In one case a court ruled that a cerebral palsied child, who was not a physical threat and was academically competitive, should be excluded from public school, because his teacher claimed his physical appearance "produced a nauseating effect" on his classmates. *Id.*

Similarly, in 1972, Congressman Vanick commented on an airline rule which allowed carriers to "refuse transportation to 'crippled' persons on the grounds that they make passengers uncomfortable." 118 Cong. Rec. 11363 (1972).

affirmed the district court's order directing the admission of the plaintiff to the residency program.

The study referred to above on the attitudes towards and experiences with hiring paraplegics also found that most employers believed that paraplegics were best suited for non-professional jobs. This stereotype was directly contrary to the fact that paraplegics are actually found to be employed most frequently as professionals. Felton, *supra* p. 20, at 321.

Often the image of what disabled people "should" do or can do has no basis in reality. Different stereotypes attach depending on the disability involved. *See* Himes, *Measuring Social Distance in Relations with The Blind*, 54 Outlook for the Blind 54 (1960). ("Each physical disability—deafness and crippleness as well as blindness—is significantly, though differently, stereotyped." *Id.* at 55.) Another study cited in the *Needs Study* indicated "that most employers would not consider people with most kinds of disabilities for production and sales jobs, but would for clerical and, to a lesser extent, managerial jobs; (and) that over 50% of the employers would *never* consider hiring a blind or mentally retarded persons for *any* type of job. . . ." Williams, *Is Hiring the Handicapped Good Business*, 38:2 J. of Rehab. 30 (1972), *cited in Needs Study* at 312.

Discriminatory employer attitudes are manifested in a variety of ways. Most obvious is the continued use of medical standards which exclude all persons with particular disabilities from employment opportunities. The individual who has a disability which is exempted, has no opportunity to prove his/her individual abilities to perform the job. Medical standards which are not formalized in writing are utilized in practice. Disabled people are rejected for employment as a result of pre-employment medical exams which merely reveal the existence of a disability rather than any actual job-related limitation.

In a recent survey of 23 California local government jurisdictions, *Medical Standards Project: Final Report,* Employment Law Center & Disability Rights Education & Defense Fund, Inc. (1982), the following exclusionary medical standards were revealed:

> All cities and counties impose restrictions of various kinds regarding the hiring of persons with past or present epileptic conditions. . . .
>
> Virtually none of the jurisdictions seems willing to hire blind applicants. . . .
>
> The written standards for one jurisdiction prohibit the hiring of an amputee for any job unless he or she makes use of a prosthesis, even though it may not be required for success on the job. Another county will not hire an applicant for any job if he or she has lost a leg, regardless of the job-relatedness of this impairment.
>
> Many jurisdictions require routine back x-rays even though the latest medical knowledge suggests that such x-rays are useless for evaluating the present ability of asymptomatic patients to work. *Id.* at 8-9.[24]

The survey also reports that many jurisdictions exclude applicants with a history of cancer.[25]

---

[24]The low predictability of low-back x-ray is examined in Rockey, Fantel, and Omenn, *Discriminatory Aspects of Pre-employment Screening: Low-back X-ray Examination in the Railroad Industry,* 5 Am. J.L. & Med. 197 (1979). Specifically, the authors conclude that of persons denied employment on the basis of low-back x-ray examinations, at least 20 percent will never have low-back pain, at least 60 percent will never lose time from work because of low-back pain, and as many as 98 percent will never require low-back surgery.

[25]A recent investigation by the Office of Civil Rights of the Department of Health and Human Services revealed extensive section 504 violations in the medical standards used to exclude disabled applicants by the Department of Social Services and Welfare of San Diego County. Letter of Finding, Dept. of Health & Human Services, Office of Civil Rights, Region IX (Nov. 7, 1980).

Seemingly more objective, but no less discriminatory, are job "requirements" which in fact bear no relation to the successful performance of the job. Moreover, "employers frequently underestimate the capabilities of disabled workers" to perform legitimate job functions. Nagi, *Work, Employment, & the Disabled,* 31 Am. J. Econ. Soc. 21 (1972), *cited in Needs Study* at 314.[26]

The *Needs Study* cited two pioneering studies which confirm that private employers, as well as state and local governments, utilize job "requirements" which bear no relationship to the successful performance of the job. Viscardi, *The Adaptability of Disabled Workers,* 2:3 Rehab. Rec. 3 (1981), *cited in Needs Study* at 326 n.45; Greenleigh Associates, Inc., *A Study to Develop a Model for Employment Services for the Handicapped* (1969), *cited in Needs Study* at 326 n. 46. Examples given are requiring employees to stand up for jobs which "can just as easily—or more easily —be performed sitting down" and requiring the "taking of written civil service tests that mentally retarded people cannot pass for jobs that they are capable of performing." *Id.* at 326. The *Needs Study* also reported a situation where "workers suffering upper limb amputations on the job were retained after a job analysis performed by the union involved discovered that, contrary to popular belief, over 80 percent of the work required on the job did not require the use of both arms." *Id.* at 804.

Outmoded stereotypes whether manifested in medical or other job "requirements" which are unrelated to the suc-

---

[26]The use of stereotypes about the physical abilities of women are analogous to the stereotypes about disabled people. For example, *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969), involved a regulation which prohibited women from lifting over 30 pounds. The court overruled the regulation because it was based on general presumptions instead of individual ability. *See also LeBlanc v. Southern Bell Telephone & Telegraph Co.,* 333 F. Supp. 602 (E.D. La., 1971), *aff'd,* 460 F.2d 1229 (5th Cir. 1972), *cert. denied,* 409 U.S. 990 (1972); *Rosenfeld v. Southern Pacific Co.,* 444 F.2d 1219 (9th Cir. 1971).

cessful performance of the job, or in decisions based on the generalized perceptions of supervisors and hiring personnel, have excluded many disabled people from jobs for which they are qualified. The function of federal and state anti-discrimination laws[27] is to assure that decisions are made on individual merit.

The following cases brought under these laws, which are presented below, illustrate the many ways in which discriminatory policies and practices exclude disabled Americans from employment opportunities.[28] As Congress realized in the 1973 Rehabilitation Act, without strong anti-discrimination protections, disabled people will continue to be judged on the basis of stereotypes and prejudice rather than individual ability.

Several cases have involved rules that exclude blind people. In *Gurmankin v. Costanzo*, 411 F.Supp. 982 (E.D. Pa. 1976), *aff'd*, 556 F.2d 184 (3d Cir. 1977), a blind English teacher was denied a job with the Philadelphia School District because she was certified as having a "chronic or acute physical defect". The Third Circuit found this policy to be unconstitutional, noting the prevalence of misconceptions about blindness and the role of anti-discrimination laws in reversing decisions based on these misconceptions:

> Sighted persons may make erroneous assumptions of the abilities of blind persons. Legislative bodies recently have recognized that the handicapped may be victims of discrimination in such areas as housing,

---

[27]Forty-six states have enacted legislation prohibiting employment discrimination against disabled persons. However, the extent of protection against discrimination extended by these statutes varies substantially from state to state depending on the definition of disability contained in the statute and the defenses extended to employers. Pres. Comm. on Employment of the Handicapped, *The Law & Disabled People* 68-80 (1980).

[28]Few Section 504 employment discrimination cases have been decided on the merits because of the split in the Circuits on the question pending before this Court.

employment, and government services. 411 F.Supp. at 985-86.

Conn. Institute for the Blind v. Conn. Comm. on Human Rights & Opportunities, 176 Conn. 88, 405 A.2d 618 (1978), involved a requirement by the Connecticut Institute for the Blind that teachers have 20/20 vision. The Connecticut Supreme Court found the school's policy to be in violation of state law, stating:

> Blanket exclusions, no matter how well motivated, fly in the face of the command to individuate that is central to fair employment practices. *Id.* at 88, 405 A.2d at 621.

Physically disabled people such as paraplegics, quadraplegics and amputees have also been deemed "unfit" for jobs regardless of individual qualifications. *Heumann v. Board of Education of the City of N.Y.*, 320 F. Supp. 623 (S.D.N.Y. 1970), dealt with the denial to the plaintiff of a license to teach in the New York City schools "on the ground that, being confined to a wheelchair as a result of poliomyelitis, she was physically and medically unsuited for teaching." *Id.* at 624.[29]

In another case involving a paraplegic, *Smith v. Fletcher*, 393 F. Supp. 1366 (S.D. Tex. 1975), *modified*, 559 F.2d 1014 (1977) the plaintiff who had a Master's degree in physiology was assigned menial clerical tasks because her supervisor had made "an arbitrary and unfounded decision as to her physical capabilities," 393 F. Supp. at 1368. The court ordered plaintiff to be promoted from a GS-9 to a GS-13, with backpay.

In *Coleman v. Casey County Board of Education*, 510 F. Supp. 301 (W.D. Ky. 1980), a bus driver was fired from his job when he had his leg amputated. The decision, which was based on a policy of excluding persons without two

---

[29]The case was ultimately dismissed as moot after the Board of Education reversed itself and granted the plaintiff a license and a teaching position. Burgdorf and Burgdorf, *The Legal Rights of Handicapped Persons: Cases, Materials, and Text* 31 (1980).

legs, was contrary to the actual evidence of the plaintiff's competence. The court found that the plaintiff:

> [H]as been evaluated by several driving instructors, each of whom stated without reservation that he is a highly competent bus driver who is not hindered at all by his prosthesis. *Id.* at 303.

People with less traditional "hidden disabilities" are also excluded from employment opportunities based on unfounded fears. In *Dairy Equipment Co. v. Wis. DILHR*, 95 Wis. 2d 319, 290 N.W. 2d 330 (1980), plaintiff was hired as a truck assembler and then fired when a subsequent medical examination revealed that he had one kidney. The company admitted that the plaintiff was a good worker and that the termination decision was based solely on his medical condition. The Wisconsin Supreme Court found that the employer's fears about employee safety and extra workers compensation costs were unfounded.

In *Sterling Transit Co. v. FEPC*, 121 Cal. App. 3d 791, 175 Cal. Rptr. 548 (1981), plaintiff's offer of a permanent position as a truck driver was revoked after a pre-employment physical examination x-ray revealed a low-back defect. The plaintiff had served in the identical position for nineteen months, had performed equivalent duties for ten years and was employed in the same capacity by another company at the time of trial. He had never had any job related back problems. Under these circumstances, the court held that the company's absolute rule against hiring persons with back deficiencies, even if not presently disabling, violated the state anti-discrimination law.[30]

The use of inflated physical requirements is illustrated in *Panettieri v. C. V. Hill Refrigeration*, 159 N.J. Super. 472, 388 A.2d 630 (1978). In that case an employer refused to re-hire a former employee after his recovery from a heart attack. After visiting the plant, the hearing officer reported that:

---

[30]*See supra* note 24 on the low predictability of low back x-rays to determine future disabling conditions.

> [T]he job description and physical demand . . . is exaggerated. . . . I further find . . . , that the weights assigned to objects . . . give a distorted picture of the physical effort required on the job." *Id.* at 472, 388 A.2d at 634.

Finally, the requirement that applicants pass a written test has also been found not to be job related. In *Stutts v. Freeman,* 694 F.2d 666 (11th Cir. 1983), the 11th Circuit found that the use of a written test, as the sole criteria for a job as an equipment operator discriminated against the plaintiff who was a dyslexic (learning disabled).[31]

Employees often attempt to justify the rejection of disabled applicants by claiming that hiring disabled workers will cause decreased productivity and safety, and increased abstenteeism and costs. An examination of the literature on the actual performance of disabled workers reveals the fallacies those rationalizations contain.

According to the *Needs Study,* the best and most comprehensive study of the job performance of disabled workers was conducted by the Bureau of Labor Statistics, U.S. Dept. of Labor, and appears in Bull. No. 923, *The Performance of Physically Impaired Workers in Manufacturing Industries* (1948), cited in *Needs Study* at 318. In this study Department staff examined the employment records of 11,000 disabled and 18,000 carefully matched non-disabled workers in manufacturing plants throughout the country. Data on productivity, absenteeism, nondisabling injuries, disabling injuries and quits were abstracted. Company

---

[31]Similarly, written tests and physical job requirements which are not job-related have been shown to discriminate against minorities and women. *Blake v. City of Los Angeles,* 595 F.2d 1367 (9th Cir. 1979); *U.S. v. State of N.Y.,* 475 F. Supp. 1103 (N.D.N.Y. 1979); *Ensley Branch of N.A.A.C.P. v. Seibels,* 616 F.2d 812 (5th Cir. 1980), *Firefighters Institute v. City of St. Louis,* 616 F.2d 350 (8th Cir. 1980), and *U.S. v. City of Chicago,* 549 F.2d 415 (7th Cir. 1977).

records rather than supervisor's impressions were the data source. For each disabled worker, one to three non-disabled workers were matched, not only for sex, age, and occupation but also for plant, shift, and particular job within the same plant and shift.

As reported in the *Needs Study:*

> The most important finding was that differences between impaired and unimpaired workers in any of the performance categories measured were slight. . . . Impaired workers had significantly higher *involuntary* termination (firing) rates. The authors attribute this to postwar practice of firing disabled workers to hire returning (able-bodied) war veterans. . . . *One of the conclusions that the authors draw is that the physically impaired worker is not necessarily a handicapped worker. The results of this major study are strong evidence that employers' fears of low performance rates among disabled workers are unjustified.* (emphasis added) *Id.* at 318-19.[32]

Interestingly, the authors found that many of the manufacturing plants surveyed reinstated policies against hiring disabled workers after having relaxed such policies during the war years. *See Needs Study* at 296-97. The reinstatement of exclusionary policies, despite the positive employment records of disabled workers, is strong evidence that these standards are not related either to functional skill or

---

[32]For example, the study specifically stated:

> The data suggest that, . . . an orthopedic impairment left more abilities than it took away. A man who has lost an arm was not necessarily incapable of performing jobs that required the use of two hands. Nor, . . . did the survey indicate that the worker who had lost a leg necessarily had to be confined to sedentary occupations. . . . Men who had lost a hand were found engaged in machine operations or in handling materials; and workers who had lost a leg were engaged in work requiring considerable walking and moving about. Bureau of Labor Statistics, Bull. No. 923, *supra* p.27, at 59.

ability required for job performance or to a concern for the safety of workers.

Numerous studies have confirmed that employer fears that disabled workers will impair efficiency or productivity, jeopardize safety records or result in higher insurance or worker's compensation costs are unfounded. Government studies have found that handicapped workers performed as well as, or better than, their non-handicapped co-workers. U.S. Bureau of Labor Standards, Dept. of Labor, Bull. No. 234, *Workmen's Compensation and the Physically Handicapped Worker*, 5, 6-8, 20 (1961); U.S. Dept. of Labor, Bull. No. 122, *Proceedings of the National Conference on Workmen's Compensation & Rehabilitation* 19 (1950). All studies on the subject support the fact that disabled workers have as good or better safety records as non-disabled workers. U.S. Dept. of Labor, Bull. No. 122 at 8.[33] Government studies have also concluded that the employment of handicapped persons does not affect the premium rates either for non-occupational benefit plans or for workers' compensation. U.S. Bureau of Labor Standards, Dept. of Labor Bull. No. 234 at 10.[34]

Over the last twenty-five years the Dupont Corporation has conducted a number of studies on the performance of its handicapped employees. The most recent report, E. I. duPont de Nemours & Co., *Equal to the Task* (1981) (DuPont Survey of Employment of the Handicapped), concluded "Dupont studies over a period of twenty-five

---

[33] *See also* Pati and Gopal, *Countdown on Hiring the Handicapped*, 57:3 Personnel J. 144 (1978); Ellner & Bender, *Hiring the Handicapped* (1980); Kalenik, *Myths About Hiring the Physcially Handicapped*, The Ca. Governor's Comm. for Employment of the Handicapped, *reprinted from Job Safety and Health* (1974); Kettle, *supra* note 20; and Pres. Comm. on Employment of the Handicapped, *A Blueprint for Action* (1980).

[34] *See also* National Institutes on Rehabilitation and Health Services, *Report of the National Workshop on Rehabilitation and Workmen's Compensation* 105 (1971); Ellner, *supra* note 33; Kettle, *supra* note 20 and Pati, *supra* note 33.

years have shown that the performance of handicapped employees is equivalent to that of their nonimpaired coworkers. In safety, job duties and attendance, the handicapped hold their own." *Id.* at 4.

As clearly demonstrated by the comparison between the studies on employers' attitudes and the studies on the actual performance of disabled workers, there is a large discrepancy between the perceived incapacity and the actual incapacity of disabled applicants and workers. Whether based on widely held misconceptions, paternalism, or prejudice, a decision not to hire or promote a qualified handicapped person constitutes discrimination.

CONCLUSION

For the foregoing reasons, Amici respectfully submit that the Court should affirm the decision below.

Respectfully submitted,

DISABILITY RIGHTS EDUCATION & DEFENSE FUND, INC.

By ARLENE BRYNNE MAYERSON*

KIMBERLY SWAIN
ROBERT J. FUNK
Counsel to Amici Curiae American Council of the Blind, et al.

**Counsel of Record*